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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

December 1, 1994

VIA COURIER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Written *Ex Parte* Submission by MFS Communications Company, Inc., in CC Docket Nos. 91-141, 93-162, and 94-97

Dear Mr. Caton:

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and in accordance with Section 1.1206(a)(1) of the Commission's Rules, hereby respectfully submits this written *ex parte* submission in CC Docket Nos. 91-141, 93-162, and 94-97. As required by the Commission's Rules, an original and two copies of this submission are provided.

In its July 25, 1994 *Virtual Interconnection Order*, the Commission declined to establish detailed rules to govern the terms of forced transitions to virtual collocation, and instead delegated authority to the Chief of the Common Carrier Bureau to resolve such issues on a case-by-case basis. In apparent disregard of the Commission's express directive, the LECs are attempting to impose a policy of "no refunds" of nonrecurring charges paid for physical collocation arrangements that are terminated by unilateral LEC action. In the attached written *ex parte*, MFS respectfully submits that the LECs' "no refunds" policy is insupportable as a matter of law and equity, and requests that the Commission reject the LEC tariff language establishing the policy, and require the LECs to refund all NRCs paid for the terminated physical collocation arrangements.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Andrew D. Lipman

Andrew D. Lipman

/sls

cc: Hon. Reed E. Hundt
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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	)	
Expanded Interconnection with Local Telephone Company Facilities	)	CC Docket No. 91-141
	)	
Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access	)	CC Docket No. 93-162
	)	
Ameritech Operating Companies, et al.	)	CC Docket No. 94-97

WRITTEN *EX PARTE* FILING OF MFS COMMUNICATIONS COMPANY, INC.: RIGHTS OF PHYSICALLY COLLOCATED PARTIES TO OBTAIN REFUNDS OF NONRECURRING CHARGES

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Dated: December 1, 1994

SUMMARY

The attempt of the majority of the LECs to deny recovery of nonrecurring charges ("NRCs") paid for terminated physical collocation arrangements is yet another glaring example of the LECs' commitment to obstruct and delay implementation of the Commission's expanded interconnection policies. Although the Commission expressly delegated to the Common Carrier Bureau the power to resolve issues relating to the transition from physical to virtual interconnection arrangements, the LECs are attempting to dictate the terms of transition by adopting a "no refunds" policy. This blatant attempt to game the regulatory process should be flatly rejected by the Commission on several grounds.

First, the LECs have absolutely no basis in contract or tariff law to impose a rule which requires MFS to forfeit its investment in physical collocation arrangements. The LECs' physical collocation tariffs, which are silent on the issue of refunds of NRCs, are ambiguous and must therefore be construed against the LECs. In addition, the reasonable expectation of the parties was that MFS would retain the use and benefit of such arrangements over a long-term basis. MFS was not on notice that its collocation arrangements were subject to unilateral termination and that its investment was at risk. Finally, Commission policy and precedent establish that changes to tariffs that threaten rate stability or may cause undue service disruptions are to be avoided. The Commission should conclude that interconnectors forced to abandon physical collocation arrangements are entitled to a full refund of NRCs as a matter of law.

Second, principles of equity demand that the LECs, who alone are in a position to eliminate the issue of NRCs, bear the costs of terminating physical interconnection

arrangements. As a matter of Commission policy, the cost-causer must be held responsible for bearing the costs of providing service. By refusing to grandfather existing physical collocation arrangements, the LECs deprive interconnectors of the use and benefit of their investment and effectively reserve such use to themselves. Equity demands that interconnectors should not be forced to forfeit their investment in physical collocation, when it is the LECs who have created the issue of who will bear the physical collocation costs.

Finally, if the Commission finds that the LECs should not bear the NRCs themselves, it should allow the LECs to recover those costs through an exogenous cost adjustment under the price cap rules. Such adjustment would have a *de minimis* impact on LEC rates, while allocation of the same costs to MFS will have a marked impact on MFS' ability to pursue the expanded interconnection policies. Because the LECs' "no refunds" policy is insupportable as a matter of law and equity, the Commission should reject the policy and instead require the LECs that continue to force termination of existing physical collocation arrangements to refund all NRCs paid for those arrangements.

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WRITTEN *EX PARTE* FILING OF
MFS COMMUNICATIONS COMPANY, INC.:
RIGHTS OF PHYSICALLY COLLOCATED PARTIES
TO OBTAIN REFUNDS OF NONRECURRING CHARGES

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and pursuant to Section 1.1206(a)(1) of the Commission's Rules,[1/] hereby respectfully requests that the Commission require local exchange carriers ("LECs") that unilaterally force MFS and other interconnectors to abandon existing physical collocation arrangements to refund all nonrecurring charges ("NRCs") paid for these arrangements. In the alternative, should the Commission find that the LECs that require termination of existing physical arrangements may recover the NRCs, MFS requests that the Commission permit LECs to recover costs incurred for physical

[1/] 47 C.F.R. § 1.1206(a)(1).

collocation as an exogenous cost adjustment pursuant to Section 61.45 of the Commission's Price Cap Rules.[2]

I. INTRODUCTION

In the nearly two years since the Commission's mandatory expanded interconnection policies first took effect, MFS has aggressively pursued collocation. MFS has established 58 physical or virtual collocation arrangements with six of the Bell Operating Companies and several of the largest independent local exchange carriers (collectively, "LECs"), and currently has an additional 31 collocation requests in progress and in various stages of completion. The most extensively collocated of all the telecommunications carriers, MFS is also more exposed to risk of loss than any other interconnector. MFS' at-risk investment in physical collocation nonrecurring charges approaches $1 million.[3]

This investment represents a significant portion of the massive investment that the interconnectors, collectively, have made in physical collocation arrangements. Coupled with the LECs' imminent, unilateral termination of these arrangements, the LECs' refusal to refund NRCs for central office preparation and cage construction is yet another example of the

[2] 47 C.F.R. § 61.45.

[3] In its collocation arrangements across the country, MFS has invested approximately $2 1/2 million in collocation NRCs. Because many of these arrangements are with NYNEX and Pacific Bell -- LECs that have agreed to continue to provide physical collocation voluntarily -- existing physical arrangements will not be terminated, and MFS need not seek refunds of the total NRC amounts paid. The majority of LECs, however, have decided to terminate existing physical arrangements, and these LECs have given rise to the instant dispute over refunds. The amount of NRCs at risk with these LECs exceeds $700,000. MFS notes that this figure reflects only MFS' investment -- the total amount of NRCs paid by all parties with existing physical collocation arrangements exceeds this figure considerably.

obstructionist tactics employed by the LECs throughout the instant proceeding. The LECs routinely have sought to delay effective interconnection by gaming the regulatory process before the Commission and state regulators and by attempting to impose excessive rates and burdensome terms and conditions upon interconnectors. Unless rejected by the Commission, the LECs' "no refunds" policy will force MFS to forfeit its near-$1 million investment and chill the development of competition in the interexchange marketplace.

The LECs' unilateral termination of physical collocation arrangements currently in operation also is a glaring example of the LECs' demonstrated bad faith in the regulatory process. Although the Commission allows grandfathering of existing customers or services as a means of resolving issues of stability and disruptions of service that would arise when existing customers become subject to new or revised regulation,[4] the LECs refuse to avail themselves of this solution and the attendant benefits. Instead, the LECs are bent on penalizing interconnectors for attempting to enter the LEC markets. No valid justification can be made for the LECs' refusal to grandfather existing physical collocation arrangements. Coupled with their decision to terminate such arrangements, the LECs' "no refunds" policy is an incontrovertible attempt by the LECs to cause a forfeiture of the interconnectors' investment in physical

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[4] *E.g.*, *Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations*, 5 FCC Rcd 7212, 7231-32 (1990) (grandfathering permitted to avoid undue loss of service, which is contrary to public interest); *Amendment of Parts 21, 41, 74, 78, and 94, Pertaining to Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 5 FCC Rcd 971 (1990) (existing microwave radio services afforded grandfathered status). Grandfathering is also a commonplace tariffing practice that the LECs perform on their own initiative. For example, Southwestern Bell has tariffed a series of "vintage" services that allow customers to renew long-term MegaLink service arrangements at rates that were in effect years ago. This tariffed grandfathering arrangement is detailed in Southwestern Bell Tariff F.C.C. No. 73, § 20.6.

collocation, and to impose unnecessary hardship upon interconnectors during the transition period. Below, MFS discusses in detail the rights of physically collocated parties to obtain refunds of NRCs.

II. LECS THAT UNILATERALLY FORCE MFS AND OTHER INTERCONNECTORS TO ABANDON EXISTING PHYSICAL COLLOCATION ARRANGEMENTS SHOULD BE REQUIRED TO REFUND ALL NONRECURRING CHARGES PAID

In light of the Court of Appeals decision in *Bell Atlantic v. FCC*,[5/] the Commission acknowledged in the *Virtual Collocation Order*[6/] that LECs would have the ability to force termination of existing physical collocation arrangements and transition to virtual arrangements. The Commission declined to establish detailed rules to govern the terms of forced transitions to virtual collocation, and instead delegated authority to the Chief of the Common Carrier Bureau to resolve such issues on a case-by-case basis.[7/]

Rather than comply with the Commission's directive to resolve issues concerning refunds and other transitional issues on an ad hoc basis, the LECs included provisions in their virtual collocation tariffs (or in Bell Atlantic's case, in the Description and Justification filed with its tariff) that flatly deny refunds to interconnectors whose physical arrangements are terminated. By attempting to impose their "no refunds" policy unilaterally and without exception

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5/ *Bell Atlantic Telephone Companies v. FCC*, No. 92-1619 (D.C. Cir. June 10, 1994) (*Bell Atlantic v. FCC*).

6/ *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, FCC 94-190 (released July 25, 1994) (*Virtual Collocation Order*).

7/ *Id*. at ¶ 213.

on interconnectors, the LECs blatantly disregard the Commission's express directive concerning transition issues. Such tactics should be recognized for what they are: a heavy-handed attempt by the LECs to dictate the terms of transition from physical to virtual collocation arrangements.

Imposition of the "no refunds" policy is also a flagrant attempt to penalize MFS and other interconnectors for seeking to implement the Commission's expanded interconnection policies. By unilaterally terminating existing physical collocation arrangements and imposing a "no refunds" policy, the LECs effectively retaliate against MFS and other interconnectors. Physically collocated parties, who collectively have paid hundreds of thousands of dollars in NRCs with the understanding that the collocated arrangements were long-term, are now forced to abandon those same interconnection arrangements without recompense.

MFS alone has paid nearly $1 million in nonrecurring charges for physical collocation arrangements -- an investment carried out in furtherance of the Commission's pro-competitive public policy goals. As MFS discusses below, as a matter of law, public policy and equity, LECs that unilaterally force interconnectors to abandon physical collocation arrangements effectively deprive interconnectors of the use of these arrangements, and so should be required to refund all NRCs paid for physical collocation.

A. Interconnectors Forced to Abandon Physical Collocation Arrangements Are Entitled to a Refund of NRCs Paid As a Matter of Law and Commission Policy

1. LEC Physical Collocation Tariffs Are Ambiguous, and So Must Be Construed Against the LECs.

Where a contract is susceptible of two possible and reasonable meanings, the common law rule of contract interpretation calls for the contract to be construed against the party who drafted it. Before interpreting a contract against the drafter, however, it must be clear to the court that the contract language was actually drafted by one party rather than the other. The fundamental characteristic of such contracts of adhesion is that only one of the parties does substantially all of the drafting, while the other can only accept or reject the contract under the terms offered. The Commission recognizes that tariffs are contracts of adhesion, with only one party formulating the rates, terms, and conditions of service, and adheres to the common law rule in stating that: "if there is ambiguity in tariffs they should be construed against the framer and favorably to users."[8/]

The Commission implicitly recognizes the contractual advantage that the tariff drafter holds over any party that accepts its tariff, and has issued strict rules to govern all tariffs filed with the Commission.[9/] Section 61.2 of the Commission's Rules requires that all tariffs contain "clear and explicit explanatory statements" regarding rates and regulations *"[i]n order to remove all doubt as to their proper application."*[10/] In addition, Section 61.54(j) provides that the general rules, including definitions, regulations, exceptions, and conditions, which govern the tariff must be stated "clearly and definitely." Tariffs must specify all general rules, regulations, exceptions or conditions which *"in any way affect the rates named in the tariff."*[11/]

8/ *Associated Press*, Request for Declaratory Ruling, 72 F.C.C. 2d 760, 764 (1979) (citing *Commodity News Serv., Inc. v. Western Union Tel. Co.*, 29 F.C.C. 1208, 1213 (1960) (initial decision), *aff'd* 29 F.C.C. 1205 (1960)) (where tariff language contains ambiguity, interpretation more favorable to customer must be adopted).

9/ *See* 47 C.F.R. §§ 61.2, 61.54.

10/ *Id.* § 61.2 (emphasis added).

11/ *Id.* § 61.54(j) (emphasis added).

The Commission consistently applies these rules in its investigations of the lawfulness of tariffs submitted for filing.[12]

Despite the Commission's clearly stated rules governing tariffs, the LEC physical collocation tariffs contain no provisions stating that customers of the tariffed physical collocation service were at risk of service termination at the LECs' will without recourse to refunds. Indeed, the LEC tariffs provide for termination for service only by force of eminent domain, sale or vacation of the central office, or if reclamation of collocated space is necessary to provide service to LEC customers.[13] Moreover, in those cases where the LEC reserved the right to require a physically collocated party to move its facilities, the LECs typically committed to paying all costs associated with the move.[14] In light of these tariff provisions, the LECs have no basis for alleging that interconnectors were on notice that their physical collocation arrangements could be terminated without cause, and that their nonrecurring charges would be

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[12] *E.g., AT&T Communications,* DA 94-889 (released Aug. 12, 1994) (failure to identify how customer can order or decline service suspends tariff revisions and triggers investigation); *Southwestern Bell Telephone Co.,* DA 94-354 (released Apr. 15, 1994) (failure to identify how carrier will develop rate for prospective customer violated §§ 61.2 and 61.54(j)); *Local Exchange Carrier Line Information Database*, 8 FCC Rcd 7130, 7133 (1993) (tariffs must include in clear and unambiguous terms general parameters of the service); *and Capital Network Systems, Inc.*, 7 FCC Rcd 8092 (1992) (proposed tariff that did not describe interexchange carrier service offering or indicate how to subscribe to service violated §§ 61.2 and 61.54(j)).

[13] *E.g.*, Bell Atlantic Tariff F.C.C. No. 1, § 19.3(H); BellSouth Tariff F.C.C. No. 1, § 20.2(C); U S West Tariff F.C.C. No. 5, § 21.4.1(A)(8). Indeed, U S West's tariff includes language stating that, if a customer was required to terminate a physical collocation arrangement for these reasons, U S West would reimburse the interconnector for direct costs and expenses.

[14] *E.g.*, Ameritech Tariff F.C.C. No. 2, § 16.1.2(A)(14); Southwestern Bell Tariff F.C.C. No. 73, § 25.7.2(B)(1)(f).

forfeit. In that MFS and the other interconnectors had no input in drafting the physical collocation tariffs, the ambiguity created by the absence of language relating to refunds must be construed against the LECs as the drafters of the tariffs.

Having failed to specify their "no refunds" rule within their physical collocation tariffs, in violation of Sections 61.2 and 61.54(j), the LECs cannot now attempt to enforce such a rule. As a matter of established contract law and tariff interpretation, the LEC physical collocation tariffs provide no basis for the LECs' refusal to refund physical collocation NRCs to MFS.

2. MFS Reasonably Expected Long-Term Use and Enjoyment of Its Physical Collocation Arrangements.

The principal purpose underlying contract law is to effectuate the reasonable expectations of the parties. In taking service under the LEC tariffs, it was the understanding of MFS and the LECs that MFS would retain the benefit of these arrangements on a long-term basis. Several facts plainly establish that the LECs and the interconnectors shared this understanding.

First, the LECs failed to specify in their tariffs any time limits on the physical interconnection arrangements. The absence of time limits establishes that the LECs in tariffing these arrangements were not contemplating operation over the short-term. Moreover, if the LECs had understood these arrangements to be merely short-term, they would now be in violation of Section 61.2 of the Commission Rules for failing to provide a "clear and explicit explanatory statement" of the time limits contemplated. Instead, the LECs provided no such statement limiting the length of time over which physical collocation arrangements would be permitted to operate. Consequently, the LECs' failure to specify any time limits fails "to remove all doubt" that the LECs are free to dictate a "no refunds" rule to interconnectors.

Of even greater significance is the fact that the Commission itself understood that physical collocation would involve long-term arrangements. The Commission prescribed as a part of its tariff analysis a computational method for the LECs to use in calculating the total monthly cost of expanded interconnection on a per-DS1 circuit-equivalent basis.[15] The prescribed method required the amortization of nonrecurring charges over a five-year period, and reflected an assumption by the Commission that a typical physical collocation arrangement would have a duration of five years.

MFS, moreover, requested from the LECs term discounts for its collocated arrangements, and was pursuing arguments with the Commission to tariff long-term commitments. These actions put the LECs on notice that MFS expected to use the physical arrangements on a long-term basis, and the LECs accepted MFS' NRC payments fully aware of this expectation.

The LECs claim that the interconnectors were "on notice" that the monies invested in collocated arrangements were at risk because the mandatory physical collocation order was on appeal and because some LECs filed their physical collocation tariffs under protest. These arguments are disingenuous, and must be rejected by the Commission. The fact that the mandatory physical collocation order was on appeal did not unequivocally demonstrate that the

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[15] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access*, 8 FCC Rcd 6909, Appendix D, "Sample Price Out Chart" (1993).

LECs rejected any and all forms of physical collocation. To the contrary, it is a matter of public record that the LECs were *not* unalterably opposed to physical collocation. In state proceedings on the issue of expanded interconnection, the LECs invariably recommended adoption of state policies that would allow the LEC *to choose* between physical and virtual collocation on a central office-specific basis.

Typical of the LEC statements proposing state policies that would allow the LECs to choose the form of interconnection are those of Southern Bell, made before the Florida Public Service Commission, which stated that "the [LECs] should have the *option of providing either physical or virtual* interconnection arrangements, taking into account collocator requests."[16] The comments of GTE, Indiana Bell, and United match those of Southern Bell, but these LECs also requested in the alternative that the Commission adopt "a policy of mandating virtual collocation, with a LEC option to *use physical collocation if it desires.*"[17]

Similarly, in proceedings before the Maryland Public Service Commission, Bell Atlantic petitioned the Maryland Public Service Commission to adopt a formal decision in favor of allowing Bell Atlantic to choose whether it would provide physical or virtual collocation.[18]

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[16] Florida Public Service Commission, Docket No. 921074-TP, Testimony of David B. Denton (on behalf of Southern Bell) (June 24, 1993) (emphasis added).

[17] *See Investigation Into Expanded Interconnection With Local Telephone Company Facilities (Collocation)*, Indiana Regulatory Comm'n, No. 39618, at 7-8 (Feb. 12, 1993) (emphasis added).

[18] Petition of C&P Telephone Co. of Maryland For Commission Adoption of a Formal Decision In Favor of Allowing LECs to Choose the Form of Interconnection to Use for Intrastate Expanded Interconnection (dated December 15, 1992).

Furthermore, Bell Atlantic *voluntarily offered* to tariff 19 or 20 central offices for which competitors had requested physical collocation arrangements.[19]

In these and many other state proceedings, the LECs consistently sought state regulatory authority, not to prohibit physical collocation, but to allow the LECs to choose between physical and virtual arrangements, depending on the needs of the collocator and the characteristics of the central offices at issue. These same LECs may not now be heard to argue that interconnectors were on notice that they were unalterably opposed to physical collocation, and would unilaterally terminate all existing physical arrangements if the LECs were empowered to do so. As such, the LEC assertion that the interconnectors were "on notice" of such risk is entirely without foundation and accordingly should be rejected by the Commission.

Similarly, the LEC assertions that their tariffs were filed under protest merits scant consideration. The LECs are being forced to do something they do not want to do -- provide reasonable interconnection to competitors. To allow the LECs to erode or eliminate rights specified under legally binding tariffs, simply by noting that the tariffs were filed "under protest," would completely undermine the Commission's expanded interconnection regime. Essentially, the "filed under protest" argument holds that any customers taking service under a tariff filed under protest do so at their own risk, regardless of the terms and conditions expressed in the tariff. This interpretation would render such tariffs meaningless, and would dissuade any customer from taking service under the tariff until all possible appeals have been exhausted. In

[19] Petition of C&P Telephone Co. of Maryland for Commission Adoption of a Formal Decision in Favor of Allowing LECs to Choose the Form of Interconnection to Use for Intrastate Expanded Interconnection, Comments of C&P (dated January 29, 1993).

the case of expanded interconnection, this rationale would have delayed the implementation of the FCC's rules for years. This result would clearly contravene the Commission's determination that "the Commission must proceed expeditiously to remove barriers to competition and to allow interconnectors to use their facilities efficiently for carriage of both special and switched transport traffic."[20]

As the foregoing discussion demonstrates, the LECs, the interconnectors and the Commission understood that physical collocation arrangements would be provided on a long-term basis. The Commission should therefore reject the LEC assertion that MFS knew that its physical collocation investment was entirely at risk.

3. Commission Policy and Precedent Establish That Tariff Changes That Threaten Rate Stability Are to Be Avoided.

The history of FCC decisions clearly establishes the Commission's policy of providing predictability and stability for the ratepayer within the rapidly changing telecommunications landscape.[21] In evaluating proposed tariff changes, the Commission has sought to avoid changes that cause rate shock to the ratepayer. As such, the Commission

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[20] *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7374, 7387-88 (1993).

[21] *E.g.*, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd 4712, 4719 (1993) (purpose of rate equalization plan is to mitigate rate shock of moving to higher special access rates); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4535 (1991) (retention of exemption provides stability whereas replacement of exemption would disrupt industry); *Policy and Rules Concerning Rates for Dominant Carriers (Pt.3 of 3)*, 4 FCC Rcd 2873 (1989) (setting upper banding limit is safeguard to protect against rate shock); *and Investigation of Access and Divestiture Related Tariffs*, 102 F.C.C. 2d 1007 (1985) (implementation of rates must avoid causing unjustifiable rate shock).

regards retroactive rate increases as a "drastic remedy" and recognizes that a strong presumption applies against subjecting customers to retroactive rate revisions.[22]

The Commission's policy of preventing surprise and avoiding rate shock to the customer is fully applicable to the LECs' attempt to deny interconnectors recovery of physical collocation NRCs. In the instant case, the LECs propose unilaterally to terminate service arrangements for which MFS and other interconnectors made substantial "up front" payments. Such action constitutes rate shock as much as any retroactive increase in rates for service already provided, and is equally offensive to established Commission policy.

As discussed, *supra*, the LECs have absolutely no basis in contract -- here, their legally binding physical collocation tariffs -- to deny MFS and the other interconnectors the right to recover physical collocation NRCs. Moreover, the interconnectors reasonably understood the physical collocation arrangements to be on a long-term basis, and thus, had no reason to believe their investment to be at risk. The LECs' unilateral termination of existing physical collocation arrangements coupled with their refusal to refund NRCs clearly constitutes the kind of unfair surprise and disruption of rate stability that the Commission consistently has sought to avoid in its tariff review process. For these reasons, the Commission should find that MFS and other similarly-situated interconnectors are entitled as a matter of policy to a full refund of NRCs paid for physical collocation.

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[22] *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd at 4720.

B. Equitable Principles Demand That the Cost-Causer Bear the Costs of Unilaterally Terminating Existing Physical Collocation Arrangements

1. The LECs Alone Are in a Position to Eliminate the Costs of Terminating Existing Physical Collocation Arrangements.

The issue of refunds of physical collocation NRCs arises for one reason alone: the LECs refuse to grandfather existing physical collocation arrangements. By unilaterally terminating these arrangements, the LECs have created the entire issue of refunds of NRCs. But for the LECs' refusal to grandfather these arrangements, MFS and other interconnectors could be satisfied that they would receive over the long-term the benefit of their investments. Instead, the LECs are bent on forcing MFS and other interconnectors to forfeit hundreds of thousands of dollars they have invested in implementing the Commission's expanded interconnection policies.

As detailed in the preceding discussion, these investments were made with the understanding that the interconnectors would retain the benefit of the physical collocation arrangements on a long-term basis. There was no notice whatsoever that the LECs would force the termination of these arrangements nor was there any suggestion that any monies expended by MFS in payment of NRCs would be wholly at risk, and subject to whatever abusive policies the LECs might subsequently choose to adopt.

Common sense, moreover, informs us that as a practical matter parties do not make substantial contract-based investments where the contract in question permits the drafting party to modify or terminate unilaterally the terms and conditions of the contract. Here, the LEC physical collocation tariffs provide no basis whatsoever for the LECs to deprive MFS of its reasonable, investment-backed expectations regarding the use of the physical interconnection arrangements.

In that the LECs fully control whether existing physical collocation arrangements will be terminated, the LECs' "no refund" policy is a flagrant attempt to penalize those interconnectors who have sought to implement the Commission's pro-competitive policies. Because no valid justification exists for the LECs' refusal to grandfather existing physical collocation arrangements, the LECs are solely responsible for creating the issue of refunds of NRCs.

2. Commission Policy Calls for the Cost-Causer to Bear the Costs of Providing Service.

The principle of cost-based rates or cost-causation is foremost among the broad principles that have served as "the foundation of Commission ratemaking decisions for the past quarter century."[23] This principle calls for the costs of providing a service to be borne by the cost-causer. In *Matter of MTS and WATS Market Structure*, the Commission summarized its view of the cost-causer principle, stating:

> the concept that users of the local telephone network should responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness. It assures that ratepayers will be able to make rational choices in their use of telephone service . . . .[24]

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[23] *E.g.*, *Provision of Access for 800 Services*, 8 FCC Rcd 1423 (1993) (longstanding policy of linking costs to cost-causer); *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7374 (1993) (rate structure for expanded interconnection for switched transport must reflect cost causation principles); *and National Security Emergency Preparedness Telecommunications Service Priority System*, 3 FCC Rcd 6650 (1988) (FCC fundamental policy is that rates must be assigned to cost-causative user, not general ratepayer).

[24] *MTS and WATS Market Structure*, 97 F.C.C. 2d 682, 686 (1983).

The cost-causer principle has also been held to be "entirely consistent with the Commission's policies fostering open entry and competition in the telecommunications industry."[25]

As stated earlier, by unilaterally terminating existing physical collocation arrangements, the LECs are solely responsible for causing the issue of refunds of NRCs to arise. The LECs alone are in a position to grandfather the existing physical collocation arrangements, thereby eliminating the need for MFS and other interconnectors to seek recovery of NRCs. The LECs, however, refuse to continue these arrangements. By depriving MFS and other interconnectors of the use of these arrangements, the LECs effectively reserve such use for themselves. As such, the LECs themselves are the cost-causers and should be held responsible for bearing the costs of physical collocation.

Application of the cost-causer principle to the issue of LEC refunds of NRCs, moreover, is "sound from a public policy perspective and rings of fundamental fairness." In establishing its physical collocation arrangements, MFS relied on a final order of the Commission and accepted service under legally binding tariffs. MFS has actively promoted the Commission's expanded interconnection policies and public interest judgments and in so doing, has paid the LECs nearly $1 million in NRCs for its physical collocation arrangements. As a matter of equity, MFS should not have to forfeit this investment. Instead, the Commission should find that the LECs, who in the first instance created the NRCs issue by their refusal to grandfather existing arrangements, are the cost-causers and should therefore bear the costs incurred to establish physical collocation arrangements.

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[25] *Id.* at 821 (Comm'r Dawson, concurring).

III. ALTERNATIVELY, LECS SHOULD BE ALLOWED TO RECOVER COSTS INCURRED FOR PHYSICAL COLLOCATION AS AN EXOGENOUS COST ADJUSTMENT UNDER THE COMMISSION'S PRICE CAP RULES

A. LECs Should Be Allowed to Recover Costs Incurred for Physical Collocation as an Exogenous Cost Adjustment.

Exogenous costs are certain costs incurred by LECs that are triggered by administrative, legislative or judicial action beyond the control of the carriers.[26] The Commission has determined that such costs should result in an adjustment to the price cap index to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.[27] The Commission's determinations are embodied in Section 61.45(d) of the Price Cap Rules.[28] Exogenous cost adjustments were established as an exception to the general price cap requirement that cost changes do not alter the price cap index and its associated incentives. The Commission judged that LECs should not be held responsible for cost changes that were not of their choosing, were not within their control, and were not otherwise reflected in the price cap formula.

If the Commission decides that the LECs should not be required to absorb the nonrecurring costs associated with termination of existing physical collocation arrangements, the Commission should allow the LECs to recover costs incurred for these arrangements as an exogenous cost adjustment because these costs clearly were caused by administrative and judicial

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[26] *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6876, 6807-08 (1990).

[27] *Id.* at 6807.

[28] 47 C.F.R. § 61.45(d).

requirements beyond the control of the LECs. The Commission's mandatory physical collocation order gave rise to the physical collocation arrangements at issue in this proceeding. The Court of Appeals reversal of the mandatory policy gave the LECs the ability to terminate existing physical collocation arrangements. The costs associated with such terminations therefore were triggered by administrative and judicial action, and so may appropriately be treated as an exogenous cost adjustment.

B. Allowing LECs to Recover Physical Collocation Costs as an Exogenous Cost Adjustment Will Have a *De Minimis* Impact on LEC Rates.

There is also an equitable basis for allowing the LECs to recover physical collocation NRCs as an exogenous cost adjustment under Section 61.45 of the Price Cap Rules. Absorbing such costs as an exogenous cost adjustment will have a *de minimis* impact on LEC rates. For example, GTE has noted that the total NRCs paid by MFS for physical collocation in GTE wire centers amount to approximately $140,000.[29] If this amount were allocated among GTE's total service costs as an exogenous cost factor, the impact on GTE's rates would be imperceptible.

In contrast, the unwarranted forfeiture of its nearly $1 million cumulative investment in physical collocation arrangements will have a marked impact on MFS and its ability to speed implementation of the Commission's expanded interconnection policies. Given the relative difference in economic hardship, as well as the fact that the exogenous cost adjustment rules were formulated to take into account the kind of administrative and judicial

[29] GTE's Opposition, filed in CC Docket No. 91-141 on November 3, 1994, at page 5.

determinations that have dominated the instant proceeding, if the Commission determines that LECs should not absorb the physical collocation NRCs, it should permit the LECs to recover them as an exogenous cost adjustment.

IV. CONCLUSION

The weight of judicial and Commission decisions, economic theory, and public policy considerations unequivocally support MFS' claim for a full refund of NRCs paid for physical collocation arrangements. In order to protect the rights of MFS and other physically collocated parties that will be forced to terminate their existing arrangements, and to ensure that LEC actions do not inhibit the growth of competition under the expanded interconnection policies, MFS respectfully requests that the Commission reject LEC tariff provisions, and similar statements made by LECs outside of tariff provisions, that deny or prejudice an interconnector's